IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 641 OF 1990.

1. Krishna Swamigal Passi.

2. Perumal Ramaswamy Fulwala. ... Appellants.
(Org.Accused Nos.4 & 5)

V/s.

State of Maharashtra .... Respondent.

Shri Prakash Shetty for the Appellants.

Shri A.S. Shitole, APP for the Respondent.

CORAM: A.S.OKA, J.

DATED: 14th November 2006.

ORAL JUDGMENT :

. Heard Shri Prakash Shetty for the Appellants and the learned A.P.P. for the State.

2. This appeal against the order of conviction is preferred by the Accused Nos. 4 and 5. The Appellants have been convicted for an offence punishable under section 304 (Part II) read with section 34 of the Indian penal Code. The Appellants have ben sentenced to suffer Rigorous Imprisonment for 6 years.

3. Briefly stated, the case of the

prosecution is that the Accused persons committed murder of one Ganapati @ Mani. A Charge was framed against the Appellants for offence punishable under section 302 read with section 34 of the Indian Penal Code. The case of the prosecution is that a Police Constable Shri Deepak Pandurang Bobhate (P.W.1) was on patrolling duty along with other constables in the Hindu Colony area in the night of 26th July 1987. In the morning at about 8.45 a.m. on 27th July 1987, the said P.W.1 found dead body of a man in front of property of Mysore Association on a footpath. There were weal marks and blood stains on the dead body. After making enquiries about the deceased, P.W.1 learnt from one Anand (Madan Anand) that the Accused assaulted the deceased in the early hours in the morning of 27th July 1987 opposite Shankar Matham Temple in third cross lane in Telang Lane, Mumbai. It was disclosed that the name of the deceased was Ganapati @ Mani. According to the case of the prosecution, the said Madan Anand Swaminath (P.W.2) had gone to a garden known as "Bhut Garden" along with Accused No.3- Mani @ Maka for cutting coconut leaves and coconuts at about 5.30 a.m. on 27th July 1987. At that time, the Accused persons came to the said garden. The Accused persons were armed with wooden sticks and iron rods and Accused No.4 (Appellant No.1) asked P.W.2 and Accused No.3- Mani whether they had stolen his iron box. P.W. 2 denied

to have stolen the iron box. However, Accused Nos.1, 2, 4 and 5 were repeatedly charging P.W.2 and the Accused No.3 of theft of the said box. Thereafter, at the instance of P.W.2- Madan Anand all of them searched for the iron box in the compound of Ramkrishna Boarding. However, the box could not be located. Thereafter they came back to the garden. At that time, they heard the noise of iron box being broken by someone. All of them proceeded towards direction of the sound and they found that the deceased Ganapati @ Mani was breaking the box. Noticing all these persons, the deceased ran away from the place. However, Accused persons followed him and he was caught by the Accused No.3- Mani, who handed over the deceased to the First Appellant. According to the prosecution case, the Accused persons tied the deceased to an electric pole in front of Dadbhawala Building and was assaulted by all the Accused with sticks and iron rods. P.W.2 was told to leave the spot by the Accused. P.W.2 came back to his house which was adjacent to the flyover bridge near Arora Cinema. At about 8.45 a.m. on 27th July 1987, P.W.1 approached P.W.2 and enquired about the dead body in front of Mysore Association. According to the prosecution case, P.W.2 identified

the dead body and narrated the incident to P.W.1-Police Constable Bobhate. According to the prosecution case, one Vijaya Kachi witnessed the incident and she knew all the Accused persons. The defence of the Accused including that of the Appellants is one of total denial and that they are falsely implicated.

4. Shri Prakash Shetty, learned Counsel appearing for the Appellants has taken me through the notes of evidence and other material on record. He submitted that the version of P.W.2 is completely unreliable as he himself has criminal antecedents. He submitted that though P.W.2 Madan Anand claims to be an eye witness who had disclosed the incident to P.W.1, the F.I.R. has been lodged by P.W.1 as late as at 9.20 a.m. on 27th July 1987. Shri Shetty submitted that statement of P.W.2 was partly recorded at 3.30 p.m. on the same day and evidence of the investigating officer shows that P.W.2 was made to sit in the police station. He submitted that as the P.W.2 has himself criminal antecedents, the police have pressurized him to give a statement and depose against the Appellants. He submitted that evidence of P.W.1 and P.W.2 is inconsistent in material

particulars. He submitted that there is no recovery made at the instance of the Appellants and the alleged recovery at the instance of Accused No.1 was not only at the belated stage, but was doubtful. He submitted that even according to the prosecution, the spot where deceased was allegedly assaulted is different from the spot where dead body of the deceased was found. He submitted that immediately after alleged assault by the Accused on the deceased, the P.W.2 left the spot. Shri Shetty further submitted that evidence of P.W.2 is full of inconsistent statements and contradictions. He submitted that it is very unsafe to rely upon the uncorroborated testimony of P.W.2 for convicting the Appellants and the other Accused.

5. In the alternative, Shri Shetty submitted that even if evidence of P.W.2 is accepted by this Court, it is obvious that an offence under section 304 (Part II) is not at all established as it cannot be said that the assault was made with the knowledge that it is likely to cause death. He, therefore, submitted that even assuming that the prosecution case is correct, conviction will have to be brought down to a lesser offence. He submitted that in any

event, even according to the prosecution case, the deceased had stolen an iron box and he was caught red handed after iron box was stolen. He invited my attention to the evidence of the Medical Officer and submitted that even from the said evidence it is very clear that none of the injuries on the person of the deceased was by itself sufficient to cause death. He submitted that a judicial notice deserves to be taken that the deceased himself was found to have committed an offence.

6. The learned A.P.P. appearing for the State submitted that there is no reason for the prosecution to implicate the Appellants and other Accused falsely. He invited my attention to the findings recorded by the Additional Sessions Judge and submitted that no interference with the same was called for.

7. I have carefully considered the submissions made by the learned Counsel for both the parties. It will be necessary to advert to the oral evidence led by the prosecution. P.W.1 Bobhate was on night patrolling duty on the relevant date. As stated earlier, at about 8.45 a.m. on 27th July

1987, he along with his colleagues found a dead body of a man in front of a building of Mysore Association. According to P.W.1, he along with his colleagues made enquiries in the neighbourhood and they ultimately reached to a man by name- Anand (P.W.2) - (Madan Anand Swaminath). The P.W.1 identified the said person in Court. According to the P.W.1, the P.W.2 informed him that the deceased was assaulted by the Accused. In the cross-examination he admitted that he was knowing P.W.2 from the year 1985. He stated that since P.W.2 was known to him he made enquiries with P.W.2. He stated that P.W.2 was arrested for stealing coconuts on number of occasions.

8. In the cross-examination, P.W.1 has admitted that he was not knowing who was the dead person. He admitted that no one except P.W.2 told him that the name of the deceased was Ganapati. In response to a question asked in the cross-examination by Advocate for one of the Accused, P.W.1 stated that he does not remember as to how many times the aforesaid witness was arrested.

9. P.W.2- Madan Anand Swaminath has stated in

his evidence that at the relevant time, he was residing on the footpath opposite Matunga Bus-stop and he knew all the Accused persons by their names and accordingly, the learned trial Judge noted that this witness gave correct names of the Accused persons. He stated that at about 5.30 a.m. on 27th July 1987 he along with Accused No.3 went to a garden behind Shankar Matham Temple for plucking leaves of the trees and coconuts. At that time, Accused Nos.1,2,4 and the absconding Accused- Shivram came there. According to P.W.2, all of them were armed with iron rods. P.W. 2 asked them why they had arrived there. At that time, the 1st Appellant asked P.W.2 as to why he had stolen an iron box. P.W.2 denied to have stolen iron box. According to P.W.2, the aforesaid 4 Accused were repeatedly charging him with theft of the said box. The premises of Ramkrishna Boarding were searched but box could not be traced.

10. After premises of Ramkrishna Boarding were searched and the box was not traced, the 1st Appellant was repeating his allegation against P.W.2 and all of them came back to the garden. At that time, they heard a sound of some one breaking an iron

box. They, therefore, proceeded towards direction from where sound being heard. They saw deceased Ganapati breaking an iron box. After noticing presence of the said persons, the deceased got up and started running from the place. He came out of the garden and when he was to enter the lane between the buildings, the Accused No.3 caught him by his collar and handed him over to P.W.2. According to P.W.2, the Appellant No.1 made the deceased to stand against the wall of the building. The Appellant No.2-Perumal was also there on the spot, who allegedly handed over a rope to the 1st Appellant. The 1st Appellant, the 2nd Appellant, the 1st Accused and the absconding Accused tied him by the rope to an electric pole. At that time, the Accused No.2 was armed with wire and Accused No.1 was carrying an iron rod. The other two had sticks with them. All of them started beating the deceased Ganapati. P.W. 2 asked the Accused not to beat Ganapati and states that he would call police and hand over Ganapati to the police. At that time, one Shiva, who is not arraigned as an Accused arrived there and he asked P.W.2 to mind his own business.

11. Thereafter, P.W. 2 came to the Flyover bridge when he learnt that Ganapati @ Mani was dead.

Thereafter, at about 8 or 8.30 a.m. P.W. 1 came there. According P.W.2, after some time Shiva and Appellant No.1 came to P.W.2. Both of them warned p.W.2 not to disclose anything which he had seen to anyone. They also pointed out that Ganapati @ Mani was killed. Thereafter, at about 2.30 p.m., he was called at the police station and his statement was recorded on the same day.

12. P.W.2 has been extensively cross-examined. In the cross-examination, P.W.2 admitted that the deceased Ganapati was arrested on 3 or 4 occasions and he himself was also arrested by the police on 5 to 6 occasions. P.W.2 admitted that the deceased Ganapati was externed from the City of Mumbai. He stated that he and the Accused No.3 used to go together for cutting the leaves of the trees. He stated that there was sufficient light to enable him to identify the persons. He stated that there was a light in the garden. He admitted that the Appellant No.1 and other Accused persons did not come in the garden shouting that their box was stolen. He stated that there are no coconut trees in the Bhut Garden and the same are by the side of the garden in some other property. He admitted that he along with

the Accused No.3 had entered from the garden so that nobody should see them while they were cutting leaves of the coconut.

13. P.W.2 stated that he was in the garden till 6.15 a.m. and he saw the deceased Ganapati being assaulted for 15 minutes. He was unable to state how many blows were given by each Accused to the deceased. He stated that all the Accused were beating the deceased simultaneously. He stated that the deceased Ganapati was beaten by the Accused in the garden. He stated that the distance between the garden and the electric pole is of 30 seconds. He told the Accused that he would call police and thereafter they would hand over custody of the deceased to the police. He, however, did not go to the police station and after leaving the place he did not go to the police station on his own. In the cross -examination, he denied the suggestion that in order to save himself from being involved in the case, he had agreed to become a witness of the police. In the cross-examination, he further admitted that no one came to the spot of incident even though there was a commotion because it was dark. In further cross-examination by Advocate for

Accused Nos.4 and 5, a question was asked to him whether he told the police that Appellant No.2-Perumal was armed with stumps. An objection was raised on behalf of the State to the said question. He stated that he had told the police that the Appellant No.2 was carrying a stick and he did not describe it as a stump. In the cross-examination P.W. 2 stated that after he returned to his house, the Appellant No.1 had come to his house. He corrected the statement by saying that Appellant No.1 and the absconding Accused had come to threaten him in the morning before the P.W.1 approached him. He stated that he had informed the P.W.1 about the threats given to him. His statement was recorded by the police between 2.30 to 3.00 p.m. He admitted that the deceased was beaten for 5 to 10 minutes, but no one came to rescue him. He also admitted that the deceased was arrested by the police on 3 occasions.

14. P.W.3- Vijaya Bhaskar Kachi, who was allegedly an eye-witness was declared hostile and nothing turns on her evidence. P.W.4- Ashok Gangaram Shinde is a Medical Officer who performed post-mortem examination on the dead body on 28th July 1987. He described 44 injuries on the person of the deceased.

Many of the injuries are contusions. There were 8 internal injuries found on the body of the deceased. He stated that after post-mortem it was found that the cause of death was congestion of brain with multiple contusions all over the body. He stated that the cumulative effect of all these injuries, external as well as internal, was that they were necessarily fatal. In his cross-examination, the P.W.4 admitted that out of the said 44 external injuries, none of the injury was individually fatal by itself. Individually, each of the injury was a simple injury. He admitted that it is not necessary that wooden stick or iron rod on the head will result into a fracture and it all depends on the nature of the blow.

15. The P.W.5 Shri Vishnu Sitaram Pote is a Draughtsman attached to the office of the Executive Engineer, Public Works Department, who had drawn the sketch of the spot of incident.

16. P.W-6 Shri Ramji H. Mulani is a witness to the inquest panchanama. He stated that after panchanama of the dead body was prepared, in the afternoon he along with other panch witnesses were

called to the police station. Witness Vijaya took the said panch witnesses along with others to the alleged place of occurrence where assault was allegedly committed near a pole to which deceased was tied by a rope. At that place a coir rope was found which was seized under a panchanama. A day thereafter, i.e. on 28th July 1987, the said witness was a signatory to another panchanama of the seizure of garments on the person of the deceased. On 14th August 1987 the said witness was a panch witness to a discovery under section 27 of the Evidence Act at the instance of Accused No.1 of the stumps which were allegedly used by the accused for attacking deceased.

17. P.W.8- Shri Ramchandra Kashinath Pawar was at the relevant time attached to Matunga Police Station. According to his version, at about 9.20 a.m. on 27th July, 1987, P.W.1 and P.W.2 came to the police station. According to him, the F.I.R. was recorded at Ex.13 by P.W.1. He also deposed about the discovery of stumps at the instance of Accused No.1. In the cross-examination he admitted that in the years 1982, 1984 and 1988, the deceased was externed from the City of Mumbai. He admitted that the statement of P.W.2 came to be recorded at 3.30

p.m. and he was made to sit till 4.45 p.m. According to the said witness he went back to his house at about 9.00 p.m. He admitted that deceased was a previous convict under section 379 of the I.P.C. on 8 occasions.

18. Report of the Chemical Analyser at Ex.18 disclosed that blood of the deceased contained 115 mg. of Ethyl Alcohol per 100 ml.

19. The learned trial Judge accepted the testimony of P.W.2 on the ground that there was no reason for the police to falsely implicate the Accused persons. The learned Judge held that evidence of the Medical Officer discloses that injuries described in Ex.19 were sufficient to cause death in the ordinary course of nature and, therefore, second part of section 304 of the Penal Code was attracted. The learned trial Judge held that merely because P.W.2 had criminal antecedents, his evidence cannot be ignored. The learned Judge acquitted the Accused No.2 and convicted the other accused.

20. The perusal of the cross-examination of

the prosecution witnesses made on behalf of Accused persons shows that it was not the case of the Accused that the police had some reason to falsely implicate them in the present case. According to P.W.1, dead body of the deceased was found at about 8.45 a.m. Thereafter, after making enquiries, P.W.1 approached P.W.2 when all the details were revealed. The evidence of P.W.8 - Shri Kashinath Pawar (Investigating Officer) shows that at about 9.20 a.m., P.W.1 and P.W.2 arrived at the Police Station. Prior to that at 9.15 a.m., the P.W.8 was informed by the P.W.7- Shri Jaysingh Sawant that an information has been received about a dead body. Accordingly, at 9.20 a.m. F.I.R. was recorded. It is true that statement of P.W.2 could have been recorded at that stage. However, the P.W.8 has deposed in his evidence that he informed Senior Inspector of having registered the offence and he along with Senior Inspector and other persons reached the spot at 10.00 a.m. The panchanama was completed at 11.30 a.m. In paragraph-3 of his deposition, the P.W.8 stated that though P.W.2 had visited the police station along with P.W..1 in the morning, as he wanted to proceed to spot he called P.W.2 in the afternoon. In the meanwhile, P.W.2- Madan Anand had arrived at the

Police Station at 11.45 a.m., who was again called in the afternoon.

21. The panchanama of the place where deceased was tied to a pole was prepared between 1.30 p.m. and 2.00 p.m. The statement of P.W.2 has been recorded at about 3.30 p.m. In view of this sequence of events, it is very difficult to come to the conclusion that the version of P.W.2 is required to be discarded only on the ground that there has been some delay in recording his statement. The delay has been sufficiently explained in the evidence of P.W.8. So far as evidence of P.W.2 is concerned, it appears to be quite natural. Perusal of the cross-examination of the said witness brings on record the fact that he was arrested by the police 5 to 6 times. Reliance is placed on the statement made in the cross-examination that at the time of assault by Accused there was a commotion and no one came to the spot as it was dark. This admission obviously is not sufficient to belie the version of P.W.2 in the examination-in-chief that there was sufficient light for him to identify the Accused persons. It must be noted here that even before the Accused persons caught hold of the deceased, the Appellant Nos.1 and

2 and other Accused persons had come armed with sticks and iron rods and had questioned P.W.2 as to why he had stolen the iron box. He has stated that while the Accused persons were alleging theft of iron box by P.W.2, all of them came out of the garden, when P.W.2 asked the Appellant No.1 to search his box. However, box could not be traced. At that time, they heard the sound of somebody breaking the box. The P.W.2 was very much there with Accused Nos.1 and 3 at the site where deceased was tied to a pole. P.W.2 stated that Appellant No.2- Perumal was a person who handed over a rope to the Appellant No.1. Only on the basis of the statement in the cross-examination that it was dark, the evidence of the P.W.2 having seen the Accused persons committing the offence cannot be ignored. Much was sought to be made out of the statement of P.W.2 in paragraph-5 in his examination-in-chief. He stated that after the Accused had told him to go away he came to Flyover bridge, when he learnt that Ganapati @ Mani was dead. At about 8.45 a.m. on 28th July 1987, a police constable came there who knew him very well. In the examination-in-chief P.W.1 in paragraph-3 has stated that he along with his colleagues made enquiries in the neighbourhood about the dead body and after

making enquiries, they reached to a man by name Anand (P.W.2). In the cross-examination of P.W.1, he has stated that he saw P.W.2 near Flyover bridge near Arora theatre. It was contended that though P.W.2 has allegedly informed the Accused not to beat Ganapati so that he would call the police and Ganapati could be handed over to the police, in fact the P.W.2 never went to police station. In paragraph-5 of the examination-in-chief, the P.W.2 has stated that after he was told to leave by the Accused he came near Flyover bridge and thereafter he learnt about the demise of Ganapati @ Mani. Thereafter, at about 8.00 or 8.30 a.m. P.W.1 met him there. Overall reading of deposition of P.W.2 shows that his version is cogent which is not shaken in the cross-examination.

22. It was sought to be contended that when the Appellant No.2- Perumal arrived at the spot where deceased was tied to a pole he was not carrying any weapon. It is not stated so by the P.W.2. However, in the cross-examination of P.W.2, it is brought on record that the Appellant No.2 was carrying stumps at the relevant time. P.W.2 has stated that Accused persons including the Appellant No.2 assaulted the

deceased after he was tied to the pole.

23. As stated earlier, nothing is brought on record to indicate that police have falsely implicated the Accused persons. I find that the learned trial Judge was right when he accepted the case of the prosecution that criminal act was done by the Accused persons, except Accused No.2 in furtherance of their common intention of teaching a lesson to deceased Ganapati @ Mani who had allegedly committed theft. The prosecution has been able to establish the fact that the Accused persons (except Accused No.2) assaulted the deceased with wooden sticks and stumps.

24. After having come to the aforesaid conclusion, the question is as to what is the nature of the offence proved against the Appellants. The Accused Nos.1 and 3 initially questioned the P.W.2 whether he had stolen the iron box and after hearing the sound of breaking the box, they proceeded towards direction of the sound and they found that deceased was breaking the iron box. Afterwards, the deceased was tied to a pole and was assaulted by using sticks and stumps as weapons of assault. It is true that

there were 44 external injuries on the person of the deceased. Most of the external injuries are in the nature of contusions. By the very nature of the incident which is established, it is difficult to come to the conclusion that the act was done by the Appellants with a knowledge that it is likely to cause death. P.W.4- Dr.Ashok Gangaram Shinde who performed post-mortem on the deceased admitted that individually none of the injuries was fatal, but cumulative effect of all the injuries, external as well as internal, was that they were fatal. Therefore, the knowledge, as required by IInd part of section 304 of the Indian Penal Code cannot be attributed to the Appellants.

25. Considering the evidence of P.W.4 it is obvious that the clause ‘eightly’ in section 320 of the Indian Penal Code will apply. However, it is not established that the Appellants had used any instrument of stabbing or cutting or any instrument if used as a weapon of offence, is likely to cause death. Thus, the offence which is established is under section 325 read with section 34 of the Indian Penal Code.

26. The substantive sentence fixed by the trial Court is of R.I. for 6 years. As I have come to the conclusion that a lesser offence has been established, naturally punishment will have to be reduced. So far as quantum of punishment is concerned, it must be borne in mind that the report of the Chemical Analyser at Ex.18 shows the presence of Alcohol in the blood of the deceased. Moreover, the deceased was caught red-handed while breaking the iron box which was stolen by him. There is no justification for assaulting a criminal who was caught red-handed. The deceased had a criminal record which is already discussed above. The maximum punishment prescribed for offence under section 325 is of 7 years. In my view, considering all the aspects of the case, punishment of Rigorous Imprisonment for 2 years and 6 months will be justified. Hence Appeal deserves to be partly allowed.

27. I pass the following order:

(a) The impugned judgment and order, so far as the Appellants are concerned, is

modified. the Appellants are convicted for offence punishable under section 325 read with section 34 of the Indian Penal Code. Appellants are sentenced to suffer Rigorous Imprisonment for 2 years and 6 months.

(b) Bail bonds of the Appellants are cancelled and Appellants are directed to surrender to bail. The Appellants shall be taken in custody for undergoing the sentence.

(c) The appellants shall be entitled to set off as per the provisions of section 428 of the Code of Criminal Procedure, 1973.

(d) The order regarding disposal of the Muddemal property is confirmed.

(e) The Appeal is partly allowed in the above terms.

JUDGE